

In The
Supreme Court of the United States
October Term, 1989

NORTHWEST LAND AND INVESTMENT, INC.,
a Washington corporation; and
GEORGE R. GREEN, an individual,

Petitioners,

v.

NEW WEST FEDERAL SAVINGS AND LOAN
ASSOCIATION, Jeffrey R. Hamilton and Jane
Doe Hamilton, husband and wife; et al.,

Respondents,

*On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Ninth Circuit*

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court grant a petition for writ of certiorari as to whether federal courts have exclusive jurisdiction over RICO claims when that issue is not dispositive of this case?
2. Have petitioners preserved the question for review when they argue, for the first time in this Court, that res judicata is inapplicable because they could not have brought their RICO claims in state court?
3. Did the lower courts err in concluding that the Washington state law of res judicata bars petitioners' RICO claims regardless of whether federal courts have exclusive RICO jurisdiction?
4. Was dismissal proper where petitioners' amended complaint failed to comply with a district court order requiring dismissal with prejudice if they failed to plead fraud with sufficient specificity?
5. Was dismissal proper as to those RICO claims for fraud of which petitioners had knowledge more than four years prior to filing suit?
6. Was dismissal proper as to the eight individual defendants who were never served?

RULE 28.1 LISTING

The parent company, subsidiaries and affiliates of respondent New West Federal Savings & Loan Association are as follows:

Parent Company: New American Holdings, Inc.

Subsidiaries: Dee-Cor, Inc.; First Charter Financial Corporation; First Pioneer Co.; Grosvenor Fund; Irvine Service Company; N.W. Associates, Inc.; N.W. Capital Corporation; N.W. Commercial Mortgage Corporation; N.W. Financial Services Company; N.W. Funding Corporation; N.W. Insurance Funding Corporation; N.W. Residential Mortgage Corporation; State Savings Service Corp.; 2790 Crossroads, Inc.; N.W. Service Company; N.W. Asset Management Company; N.W. Mortgage, Inc.; ASL (Cayman) Ltd.

Affiliates: New American Capital, Inc.; N.A. Capital Holdings, Inc.; American Savings Bank, F.A.; American Real Estate Group, Inc.; American Advertising Services, Inc.; ASB Financial Services, Inc.; Little Mavericks, Inc.; N.A. Computer Services, Inc.; N.A. Mortgage Services, Inc.; N.A. Real Estate Service Corporation; Stockton Capital Corporation; ASB Insurance Services, Inc.

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STATUTES INVOLVED

In addition to the statutes set forth in the Petition for Writ of Certiorari, this case also involves 15 U.S.C. § 15b and 28 U.S.C. § 1738. Copies of these statutes are contained in the Appendix hereto.

STATEMENT OF THE CASE

A. NATURE OF THE CASE.

In this action, a disappointed litigant seeks to overturn a state court judgment. Petitioner Northwest sued American Savings in state court for breach of contract and unfair and deceptive acts and practices. American counterclaimed. The state trial court entered a net judgment against petitioner Northwest for over \$6,500,000.

Northwest now seeks to relitigate the same facts under RICO. It seeks damages of treble the judgment already assessed against it. The district court concluded that the doctrine of res judicata precluded Northwest's claims and dismissed them on summary judgment. The court of appeals affirmed.

B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW.

On April 20, 1987, petitioners Northwest Land & Investment, Inc., and George R. Green filed a complaint in the United States District Court for the Western District of Washington.¹ Named defendants were American Savings & Loan Association and 13 individuals alleged to be American officers, directors, or agents.²

Northwest alleged fraud, intentional misrepresentation, and unfair and deceptive acts and practices in connection with two real estate development loans. Northwest claimed that this conduct violated the Racketeer Influenced & Corrupt Organizations Act (RICO).

American moved to dismiss for failure to plead fraud with the particularity required by Fed. R. Civ. P. 9(b). The district court ordered Northwest to file an amended complaint

¹ Northwest and Green will hereafter be referred to as "Northwest."

² Respondent New West Federal Savings & Loan Association is American's successor in interest. The individual defendants were Jeffrey R. Hamilton, Jack A. Rademan, Thomas T. Welch, Lee Stevens, Dan Gallagher, Jerry Pancratz, Bob Neilbeck, A. Foster Fluetsch, Edward D. Marx, Ray E. Stewart, James P. Anthony, John J. Borer, and Arthur L. Shingler, and their wives. Rademan did not appear and is not a party to this appeal. The remaining individual defendants are respondents herein.

specifying, among other things, the content of each alleged misrepresentation. The order provided for dismissal with prejudice if Northwest failed to comply.

Northwest filed an amended complaint. Despite the district court's specificity order, the amended complaint failed to specify the content of many alleged misrepresentations.

Defendants moved to dismiss for failure to comply with the specificity order. Alternatively, they requested summary judgment on the following grounds:

(1) A final state court judgment entered against Northwest was *res judicata* as to its RICO claims;

(2) Several of the RICO claims were time-barred.

Eight of the individual defendants had never been served. They moved to dismiss for insufficiency of process and insufficiency of service.

All defendants requested sanctions under Fed. R. Civ. P. 11.

Northwest did not seriously dispute that its evidence in the RICO action would be identical to the evidence in the state court proceeding. Furthermore, it conceded that the state court judgment collaterally estopped it from relitigating its damages. It claimed that its RICO damages were merely treble the amount of the state court judgment against it.

Northwest's main argument was that *res judicata* was inappropriate because its counsel had *erroneously believed* that it could not have brought its RICO claims in state court. Northwest argued that its counsel could not have anticipated the decisions by the Court of Appeals for the Ninth Circuit and the Washington Supreme Court that state courts have concurrent jurisdiction.³

On April 21, 1988, the district court granted defendants summary judgment on the ground that the state court judgment precluded Northwest's RICO claims. In so holding, the court observed as follows:

Plaintiffs also could have brought their action in this court, seeking to join the state law claims under the doctrine of pendent jurisdiction. Having chosen to litigate in state court, plaintiffs cannot now require defendants to relitigate the same fact allegations and defenses on another front.

Slip op. at 6 (citations omitted; emphasis added). The court declined to impose rule 11 sanctions or rule on defendants' alternative grounds for dismissal.

³ See *Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988); *Rice v. Janovich*, 109 Wn.2d 48, 742 P.2d 1230 (1987).

On appeal, Northwest still did not argue that federal courts have exclusive jurisdiction over RICO claims. Indeed, in its reply brief, it stated that, with the *Lou* and *Rice* decisions, "the matter of jurisdiction [was] laid to rest, clearly giving state courts concurrent jurisdiction over RICO claims." (Appellants' Reply to Appellee's Joint Brief, p. 1.)

In an unpublished opinion, the Court of Appeals for the Ninth Circuit affirmed the dismissal "for all the reasons stated" in the district court's opinion. In addition, the court affirmed the denial of sanctions on the ground that counsel's original belief that federal courts have exclusive RICO jurisdiction was not wholly frivolous in light of this Court's grant of certiorari to decide the issue in *Tafflin v. Levitt*, 57 U.S.L.W. 3775 (U.S. May 30, 1989).

C. STATEMENT OF THE FACTS.

In September 1981 American agreed to finance Northwest's development of two Whatcom County, Washington, residential housing projects. Subsequently American "phased" the financing by limiting current funding to a portion of the projects. Further funding was dependent upon sales.

Sales were poor. When Northwest failed to make interest payments, American instituted nonjudicial foreclosure proceedings.

In July 1984 Northwest and its president, George R. Green, sued American in Whatcom County Superior Court. Plaintiffs alleged nine different legal theories including breach of contract, intentional misrepresentation, fraud, and violation of the Washington Consumer Protection Act, RCW ch. 19.86.

American denied liability. It counterclaimed for judicial foreclosure and a deficiency judgment.

Only Northwest's breach of contract and Consumer Protection Act claims went to the jury. The trial court reserved determination of American's counterclaims.

The jury returned a \$505,169 verdict for Northwest. The trial court, however, found that Northwest owed American over \$7 million. Setting off the verdict against this amount, the court entered judgment against Northwest and for American in the amount of \$6,570,556.44.

Both parties appealed to the Washington Court of Appeals. That appeal is pending. In the meantime, Northwest had brought this action in federal court.

REASONS FOR DENYING THE WRIT

Northwest's purported RICO claims arise out of the very same transactions that were at issue in state court. Indeed, Northwest concedes that the state court judgment fixes the amount of its compensatory damages: under RICO it seeks to recover treble the amount of the net judgment entered against it in state court.

In short, Northwest intends to use RICO's treble damages provision to nullify American's state court judgment. The lower courts properly rejected this attempt.⁴

Northwest argues that this Court should grant certiorari to determine whether federal courts have exclusive jurisdiction over RICO claims because this Court has already agreed to determine this issue in *Tafflin v. Levitt*, 57 U.S.L.W. 3775 (U.S. May 30, 1989). In *Tafflin*, the court of appeals expressly ruled that the district court properly abstained from deciding plaintiffs' RICO claims because the same claims were pending in state court. *Tafflin v. Levitt*, 865 F.2d 595, 597 (4th

⁴ That the Whatcom County matter is on appeal does not deprive the judgment of its finality for res judicata purposes. In Washington, an appeal does not negate the preclusive effect of a judgment as between the parties. *In re Walton Plywood*, 227 F. Supp. 319, 325 (W.D. Wash. 1964); *Riblet v. Ideal Cement Co.*, 57 Wn.2d 619, 621, 358 P.2d 975 (1961).

Cir. 1989). Thus, the issue of concurrent jurisdiction over RICO claims was directly at issue.

Here, however, the lower courts ruled that the Washington state law of *res judicata* barred Northwest's RICO claims. As will be discussed, summary dismissal on this basis was correct even if federal courts have exclusive RICO jurisdiction.

Furthermore, Northwest waived the issue because it never raised it below. Neither the district court nor the court of appeals addressed the issue because it was never before them. Finally, the summary dismissal was correct for reasons other than *res judicata*.

A. THE STATE COURT FINAL JUDGMENT BARS NORTHWEST'S RICO ACTION REGARDLESS OF WHETHER FEDERAL COURTS HAVE EXCLUSIVE JURISDICTION OVER RICO CLAIMS.

Under 28 U.S.C. § 1738, the federal courts must give the same preclusive effect to the Whatcom County court judgment as the Washington courts would give it. See *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466 (1988). Northwest correctly concedes that the Washington state law of *res judicata* governs this case. (Petition for Writ of Certiorari at 5.)

Thus, the issue in this case is *not* whether federal courts have exclusive jurisdiction over RICO claims. The issue is whether the Washington state law of res judicata bars Northwest's RICO claims. The lower courts ruled that under Washington law, res judicata barred the claims, in part because Northwest could have brought its RICO claims in federal court and joined its state law claims under the doctrine of pendent jurisdiction. Thus, the courts ruled that Washington law barred the RICO claims even if federal jurisdiction over RICO claims is exclusive.

Unlike *Tafflin*, therefore, the exclusive jurisdiction issue is not dispositive here. Moreover, even if the lower courts erred in construing Washington state law to bar Northwest's claims, the "error" raises only questions of state, not federal, law. This Court should not grant certiorari in this case.

In any event, the lower courts did not misconstrue Washington state law. Although there are no Washington cases directly in point, courts in other jurisdictions have ruled that res judicata bars a federal court RICO action when the plaintiff has already prosecuted similar state court claims to judgment, regardless of whether federal courts have exclusive RICO jurisdiction.

For example, in *Luebke v. Marine National Bank*, 567 F. Supp. 1460 (E.D. Wis. 1983), plaintiff argued that res judicata was inappropriate because he could not have joined his RICO claims in state court. The court rejected this argument, because plaintiff could have originally sued in federal court and joined his state law claims under the doctrine of pendent jurisdiction. *Id.* at 1462. Accord *Carman v. First National Bank*, 642 F. Supp. 862, 864-65 (W.D. Ky. 1986); *Karel v. Kroner*, 635 F. Supp. 725, 731 (N.D. Ill. 1986).

Printing Mart-Morristown, Inc. v. Rosenthal, 650 F. Supp. 1444 (D. N.J.), *app. dismissed*, 833 F.2d 306 (3d Cir. 1987), reached the same result under different reasoning. The court refused to decide the jurisdictional question. Instead, it ruled that res judicata barred plaintiff's RICO claims because "plaintiff was obliged to assert its RICO claim before the state court and submit the jurisdictional question to that court for independent determination." *Id.* at 1450.

Northwest did not attempt to bring its RICO claims in the state court action. It did not attempt to bring them in federal court in the first instance together with its pendent state law claims. The district court and the court of appeals properly ruled that it could not now bring them in federal court.

Thus, contrary to the implication in Northwest's petition, the issue of whether federal court jurisdiction over RICO claims is exclusive is simply not dispositive of this case. Summary judgment on the basis of *res judicata* was proper regardless of whether federal courts have exclusive jurisdiction. This case is not appropriate for this Court's consideration.

B. THIS COURT WILL NOT REVIEW ISSUES NOT RAISED BELOW.

In any event, Northwest has waived any argument that *res judicata* is inapplicable because it could not have brought its RICO claims in state court. In the lower courts, Northwest merely argued that at the time of the state court action, its counsel *erroneously believed* that it could not bring its RICO claims in state court. It argued that it could not have anticipated the decisions of the Court of Appeals for the Ninth Circuit and the Washington Supreme Court that state courts have concurrent jurisdiction. See *Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988); *Rice v. Janovich*, 109 Wn.2d 48, 742 P.2d 1230 (1987). It did *not* argue that these decisions were wrong.

This Court will refuse to consider issues not raised below. See *Equal Employment Opportunity Commission v. Federal Labor Relations Authority*, 476 U.S. 19 (1986) (dismissing writ of certiorari as improvidently granted). Northwest has *never* argued that *res judicata* was inapplicable because federal courts in fact have exclusive jurisdiction over RICO claims.

Indeed, Northwest is raising this issue for the first time because it has now discovered that this Court will be deciding the jurisdiction question in another case. This Court should not permit Northwest to profit from the efforts of those who properly raised the issue when Northwest itself failed to do so.

Northwest may claim that it may raise exclusive jurisdiction at any time because jurisdiction cannot be waived. The rule that subject matter jurisdiction cannot be waived does not apply here. Northwest is not challenging the jurisdiction of the district court or the court of appeals to decide the *res judicata* issue in this case. Rather, Northwest is merely seeking to raise jurisdiction as a ground for not applying *res judicata*.

Northwest has waived any argument that *res judicata* is inapplicable because federal courts have exclusive jurisdiction over RICO claims. This case is not appropriate for this Court's review.

C. SUMMARY JUDGMENT WAS PROPER FOR REASONS OTHER THAN RES JUDICATA.

Even if Northwest's res judicata argument had merit, this case would not be appropriate for this Court's certiorari jurisdiction. The district court's grant of summary judgment was correct for reasons other than res judicata. None of these reasons present issues of sufficient import to warrant this Court's consideration.

1. The Amended Complaint Failed To Comply With The District Court's Specificity Order.

The district court ruled that it would dismiss Northwest's claims with prejudice if it failed to file an amended complaint specifying the content of each alleged misrepresentation. Northwest did not appeal this order.

The amended complaint did not comply with the specificity order. For example, paragraph 66(d) simply alleged that "defendant Hamilton made several material misrepresentations to plaintiffs regarding the terms and conditions of the Sunrise loan."

The amended complaint failed to specify the content of these and other alleged misrepresentations. The district court could have properly dismissed the amended complaint for this

reason alone. See *Hayduk v. Lanna*, 775 F.2d 441, 445 (1st Cir. 1985); *Miscellaneous Service Workers Local #427 v. Philco-Ford Corp.*, 661 F.2d 776, 782 (9th Cir. 1981).

2. The Statute Of Limitations Bars Recovery For Claims Arising From Acts Discovered Prior To April 20, 1983.

The four-year statute of limitations for Clayton Act actions, 15 U.S.C. § 15b, applies to RICO claims. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, ___ U.S. ___, 107 S. Ct. 2759 (1987). The limitations period begins to run when the plaintiff has actual or constructive knowledge of the alleged fraud. *Beneficial Standard Life Insurance Co. v. Madariaga*, 851 F.2d 271, 275 (9th Cir. 1988).

Northwest claimed that defendants wrongfully failed to advise that the loans would be "phased", i.e., that disbursement of the loan funds would be contingent upon sales. In paragraph 47 of its amended complaint, Northwest explained how it discovered this alleged deception as follows:

On December 10, 1981, defendants American and Hamilton advised plaintiffs in writing that [American] intended to phase the financing of both loans by limiting construction . . . and that further funding would be phased according to sales. Plaintiffs complained continually to American about these restrictions

Northwest filed this RICO action in April 1987, more than five years after its December 1981 discovery of the alleged fraud. To the extent that Northwest based its claims on the alleged phasing misrepresentation, the district court's summary judgment was correct.

3. Northwest Failed To Serve Eight Individual Defendants.

Of the 13 individuals named as defendants, eight were not served with process within 120 days as required by Fed. R. Civ. P. 4(j). Indeed, these defendants were not served at all.⁵ The district court could have properly dismissed the claims against these parties for lack of personal jurisdiction and insufficiency of service of process. Indeed, in its reply brief in the court of appeals, Northwest "concede[d] that . . . certain defendants were not served within 120 days from issuance of the Summons and that they may move for dismissal." (Appellants' Reply to Appellee's Joint Brief, p. 10-11.)

⁵ The eight unserved defendants are respondents Stevens, Gallager, Pancratz, Neilbeck, Marx, Stewart, Borer, and Thomas Welch.

CONCLUSION

The court of appeals decision does not conflict with the decision of another federal court of appeals because the issue of whether federal jurisdiction over RICO claims is exclusive was not dispositive. Furthermore, the court of appeals decision does not even raise a substantial federal question because under 28 U.S.C. § 1738, Washington state law determines whether *res judicata* applies.

Furthermore, Northwest *never* argued that *res judicata* was inapplicable because federal courts actually have exclusive jurisdiction over RICO claims. It first raised this issue in this Court, when it discovered that this Court had already agreed to consider the question in another case. Northwest did not present the issue to the district court. Northwest did not present the issue to the court of appeals. Northwest cannot now present the issue to this Court.

This Court's certiorari jurisdiction should not be used to determine nondispositive issues or to decide questions of state law or to correct the errors of parties or their counsel. Summary judgment was proper regardless of whether federal courts have exclusive jurisdiction over RICO claims. This Court should deny the petition for writ of certiorari.

DATED this 23rd day of October, 1989.

Respectfully submitted,

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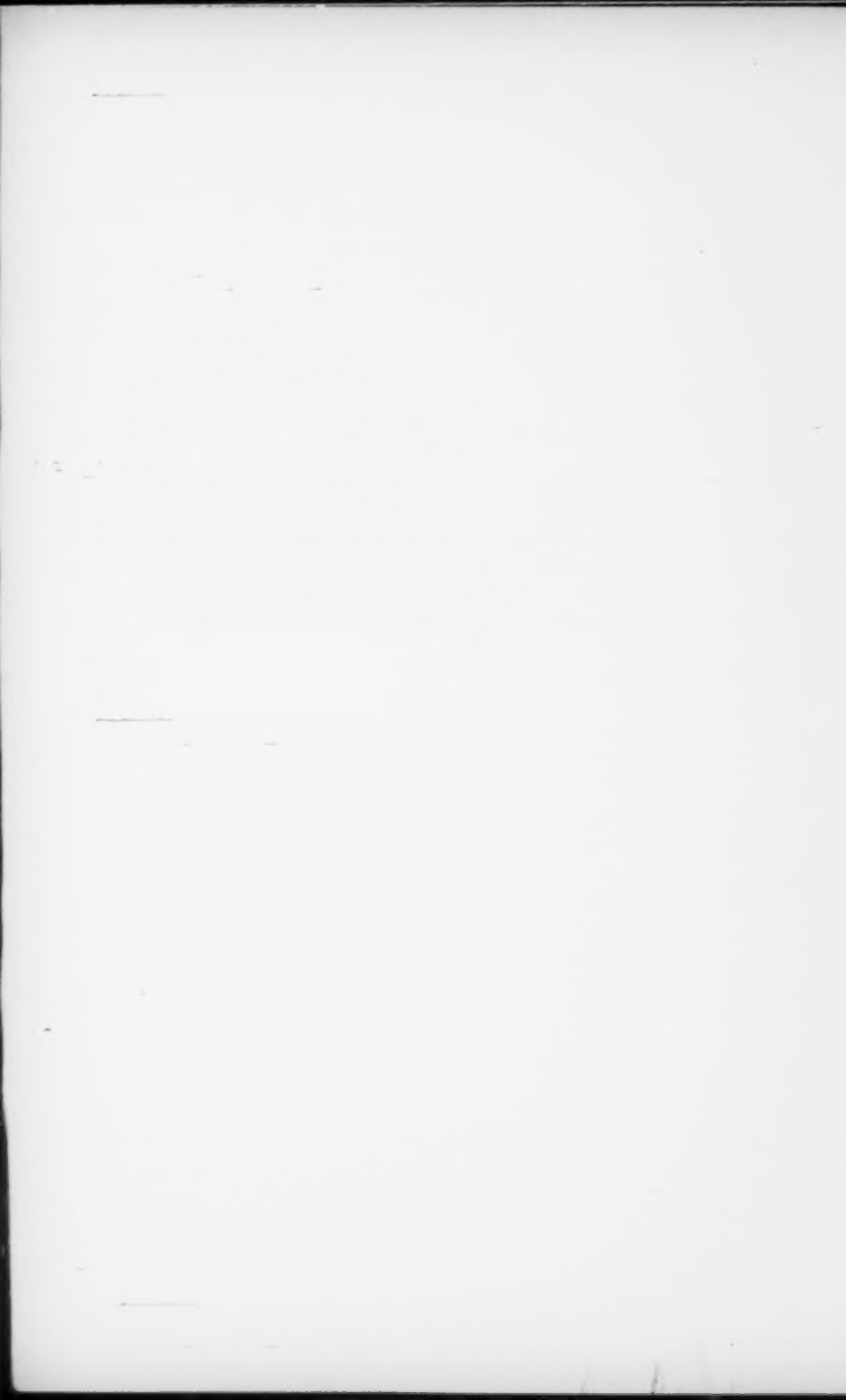
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APPENDIX "A"

15 U.S.C. § 15b.

§ 15b. Limitation of actions

Any action to enforce any cause of action under section 4, 4A, or 4C [15 USCS §§ 15, 15a, 15c] shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.



APPENDIX "B"

28 U.S.C. § 1738.

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.